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No. 00-452

In The

Supreme Court of the United States

MARGARET BOYAJIAN, CHARLES COUNSELMAN, AND JEAN DICKINSON,

Petitioners,

versus

THOMAS GATZUNIS, BUILDING INSPECTOR OF THE TOWN OF BELMONT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Massachusetts Dover Amendment, Mass. Gen. Laws ch. 40A § 3 (1997), which forbids local communities from applying zoning ordinances or by-laws that "prohibit, regulate, or restrict the use of land or structures for religious purposes," is not a permissible accommodation of religion, but rather a direct benefit for religion that violates the Establishment Clause of the First Amendment.

2. Whether the Belmont Zoning By-Law, which carries out the mandate of the Dover Amendment, violates the Establishment Clause.

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REPLY

While it is rare that a reply is necessary at the certiorari petition stage, it is absolutely necessary in this case where the Respondents have misrepresented the record below, the status of the law were this Court to invalidate the Dover Amendment, and the power of Massachusetts local governments to determine zoning requirements.

Moreover, it bears repeating that the Massachusetts Dover Amendment is not a generally applicable, neutral scheme, but rather an arbitrary collection of exceptions to the general law, which includes one for "religious purposes" that triggers close Establishment Clause scrutiny. The Respondents' reasons to deny certiorari are not persuasive.

I. The Respondents' Laches and Remedies Arguments Are Red Herrings

Respondents make the specious argument that because they have completed and opened the Temple, Resp. at 13, this Court should not consider the constitutionality of the Dover Amendment. Respondents fundamentally misunderstand the operation of local zoning laws and apparently the posture of this case.

There are no obstacles to relief that would counsel in favor of denying the petition. First, the scope of the remedy in the event of a violation of the Establishment Clause is simply not before this Court. The court below never addressed the remedies issue.

Second, Respondents attempt to create the false impression that Petitioners sat on their rights for seventeen months while the Temple was built. The facts reveal otherwise. The building permit was issued on October 29, 1997, and the complaint was filed less than eight months later on August 25, 1998. *See* Appellate Record Below at 4. At the time of filing, there was only bare site preparation. Thus, the Church was fully aware of the constitutional challenge to its building long before the project advanced to any significant degree.

Third, Respondents' arguments about laches did not dissuade the courts below from proceeding onto the merits. If Respondents were correct that laches now prevents this Court from addressing the constitutionality of the Dover Amendment, churches would have an incentive to build swiftly in the face of any Establishment Clause challenge on the ridiculous theory that a completed building is a bar to appellate review of the constitutionality of the laws governing construction. The Church was fully aware of this challenge and assumed the risks imposed by the Establishment Clause when it moved forward expeditiously.

Finally, it is an amazing misunderstanding of zoning law to believe, as Respondents apparently do, that demolition is the only available remedy in a dispute over the constitutionality of a zoning law. Were this Court to hold that the Dover Amendment violates the Establishment Clause, a wide range of remedies would be on the table on remand, from demolition of the building to requirements that the Temple expand neither its building nor its parking lot and that the Church minimize traffic, noise, and light pollution to the maximum extent in the interest

of surrounding homeowners. As Petitioners have made clear since the filing of this lawsuit, they do not object to a religious building next to their homes, but rather the extraordinary negative secondary effects that flow from a huge building intended to draw large numbers of visitors in a residential neighborhood.

II. Were This Court to Find That the Dover Amendment Violates the Establishment Clause, Belmont Would Have the Power to Enforce Its Existing Generally Applicable, Neutral Zoning Regulations and Its Citizens the Power to Enact Others that Would Reduce the Harm to Petitioners

Respondents make the argument that invalidating the Dover Amendment would not improve the Petitioners' position, because the Church would have the benefit of a seventy-five-year-old zoning by-law that permits churches in residential neighborhoods. Resp. at 19-20. Were the Dover Amendment to be struck, however, the Petitioners would be in a much better position for two reasons. First, the full force of Belmont's zoning authority – and not the limited subset permitted under the Dover Amendment – would be applicable to the building at issue in this case. In the absence of the Dover Amendment, the neighbors will receive the benefit of the community's strong interest in crafting residential, livable neighborhoods. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (the government has a substantial interest in protecting the well-being, tranquility, and privacy of the home and therefore may regulate speech through a neutral time, place, and manner regulation).

Second, the citizens of Belmont will be free to enact generally applicable, neutral zoning regulations that aid Petitioners and others in their situation that they could not have enacted before. The law that the Respondents assumes springs into effect is a law that is seventy-five years old, *see Boyajian v. Gonzunis*, 212 F.3d 1, 30 (2000), and was passed at a time when there were, for example, no automobiles and therefore no parking problems and no traffic. The negative secondary effects now burdening Petitioners were unimagined. Because of the presence of the Dover Amendment, that by-law was never amended to reflect the evolution of zoning laws in general. In the absence of the Dover Amendment, the citizens of Belmont in a town meeting will have the ability to enact generally applicable, neutral rules to protect citizens like the neighbors in this case from the extreme negative secondary effects that flow from large buildings that generate intense traffic, noise, and light pollution in residential neighborhoods.

In particular, the citizens of Belmont will be able to consider generally applicable, neutral rules that prohibit further expansion of existing buildings, allow traffic control, and regulate the intensity of the use, any of which would improve the position of the Petitioners in this case. Therefore, striking the Dover Amendment places Petitioners in a much better position than before. As long as the Dover Amendment stands, the citizens of Belmont may not protect residential neighborhoods, including the Petitioners', against many negative secondary effects generated by large religious buildings with large parking lots and many visitors.

The Massachusetts cases cited by Respondents in support of their position that a decades-old Belmont by-law provision relative to religious uses would be the law if the Dover Amendment and the present, long-standing Belmont equivalent were struck down, do not in fact support that position. Those cases involved courts striking local government decisions to rezone (or alter the classification of) a parcel or parcels of land. They were stricken on the ground that they were illegal "spot zoning." *See Beal v. Building Comm'r*, 353 Mass. 640, 644, 234 N.E.2d 299, 302 (1968); *Mitchell v. Board of Selectmen*, 346 Mass. 158, 161, 190 N.E.2d 681, 683 (1963); *Cross v. Planning Brd.*, 345 Mass. 618, 621, 189 N.E.2d 189, 191 (1963). In those cases, the previously existing classification in effect before the spot-zoning remained in force after the spot-zoning was found illegal. This reasoning is irrelevant in the context of a constitutional challenge to a statute like the Dover Amendment.

On Respondents' theory, the presence of the unconstitutional Dover Amendment and its deterrence to zoning reform are insurance against a finding that it is unconstitutional. That cannot be right.

III. Respondents Fail to Note That Massachusetts Zoning Law Is a Matter of Local Right Under the Massachusetts Constitution's Home Rule Amendment, Mass. Const. Am. Art. 89 (1966)

Respondents make the remarkable claim that zoning law in Massachusetts is a creature of state law, and state law alone, as though citizens do not have broad state

constitutional power to determine the zoning requirements in their communities. Resp. at 28. For whatever reason, Respondents fail to mention that Massachusetts, like most states, has ratified a Home Rule regime, Home Rule Amendment, Mass. Const. Am. Art. 89 (1966), under which communities are given the constitutional right to shape their own zoning regulations in light of the needs of their citizens. *See generally Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 357-58, 294 N.E.2d 393, 408 (1973) (zoning power is independent power of local community). The right of local self-determination on zoning issues has been a pillar of zoning law in Massachusetts since at least 1966 when the Massachusetts Constitution was amended to include home rule. The Dover Amendment is in tension with the later-ratified Home Rule Amendment, and its violation of the Establishment Clause must be measured against the legal backdrop of home rule, not the Respondents' state-centered theory of zoning law.

Finally, Respondents argue that this Court should not address the Dover Amendment, because such a decision would have limited importance on the ground that "no other states have laws similar to the Dover Amendment." Resp. at 22. Their arguments in support of the Amendment, however, belie their argument that its constitutional validity is a question with limited importance. On their theory, there is no meaningful constitutional difference between the Dover Amendment and any other zoning privilege for religious buildings. Resp. at 26-27. There is no limiting principle to their assertion that zoning preferences for religious uses should be permitted "as a

matter of right" because courts should assume that zoning decisions "by local officials about which religious uses to permit are susceptible to unfairness as well as conscious or unconscious bias." Resp. at 26.

If the Respondent's theory in defense of the statute is left to stand, this Court can be certain that religious entities will push for ever-broadening zoning "rights" in all localities against imagined discriminatory motives. Indeed, they have achieved a degree of success through this very tactic with the Religious Land Use and Institutionalized Persons Act, H.R. 4862, 106th Cong. (2000). *See also* Naomi Schaefer, *Build It and They Will Sue*, Wall Street Journal, Dec. 1, 2000, § W, at 19 (land use privileges for religious entities "while helping some, may push aside the interests of homeowners. As difficult as these disputes may be to resolve, they are probably still best left to local – not higher – authorities."). Religious entities also will employ this Court's decision to deny certiorari, were it to deny, as an argument in favor of such privileges. *See, e.g., Parochial School Vouchers*, New York Times, Aug. 29, 1999, § 4, at 14. The Dover Amendment presents a weighty church/state matter of wide-ranging importance that requires this Court's attention.

CONCLUSION

For the reasons stated here and in the petition for certiorari, Petitioners respectfully request this Court grant certiorari to address the severe constitutional defects of the Dover Amendment. In the alternative, if this Court grants certiorari in *Children's Healthcare Is a Legal Duty, Inc. v. Min de Parle*, No. 00-914, on the question of the meaning of permissible accommodation, Petitioners respectfully request this Court hold this case for consideration in light of *CHILD, Inc.*

Respectfully submitted,

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